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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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| 10/533,101 | 03/20/2006 | Nigel Hugh Sanders | 1421-76 PCT/US | 2312 |
| 23869 | 7590 | 12/31/2008 | EXAMINER | |
| HOFFMANN & BARON, LLP 6900 JERICHO TURNPIKE SYOSSET, NY 11791 | | | | KRAUSE, ANDREW E |
| ART UNIT | | PAPER NUMBER | | |
| 1794 | | | | |
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

| | | |
|------------------------------|------------------------|---------------------|
| Office Action Summary | Application No. | Applicant(s) |
| | 10/533,101 | SANDERS ET AL. |
| | Examiner | Art Unit |
| | ANDREW KRAUSE | 1794 |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on ____.
- 2a) This action is **FINAL**. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-14 is/are pending in the application.
 - 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) Claim(s) ____ is/are allowed.
- 6) Claim(s) 1-14 is/are rejected.
- 7) Claim(s) ____ is/are objected to.
- 8) Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on ____ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 - a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. ____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

| | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. ____ . |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>8/1/05</u> . | 6) <input type="checkbox"/> Other: ____ . |

DETAILED ACTION

Claim Objections

1. **Claims 10 and 11** are objected to because of the following informalities: step(iii) should be changed to step (3). Appropriate correction is required.

Claim Rejections - 35 USC § 103

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

3. **Claims 1-10** are rejected under 35 U.S.C. 103(a) as being unpatentable over Aldrich (US #4,517,205, hereafter Aldrich) in view of Franke (DE 19503635, English translation, and Derwent Abstract, hereafter Franke).

4. Aldrich discloses a method of preparing molded confectionary articles, comprising the steps of:
 - a. Preparing a liquid candy composition which solidifies upon cooling, said liquid composition being a first temperature (column 4, lines 51-65);
 - b. Preparing a second liquid composition which solidifies upon cooling (column 3, lines 25-40), said second liquid composition being at a second temperature which is lower than the first temperature(column 4, lines 62-66);
 - c. Co-depositing the liquid candy composition and the second liquid composition in molds (column 3, line 63 to column 4, line 5);and
 - d. Cooling the molded compositions in the molds so as to solidify the molded compositions to form molded confectionary articles (column 4, line 66- column 5, line 3). The examiner notes that although Aldrich does not explicitly disclose cooling the compositions, it is inherent that the composition will cool to room temperature following the deposition step.
5. Aldrich fails to explicitly disclose preparing a liquid chocolate composition as the second composition, although Aldrich does disclose that chocolate can be used as the second component. Aldrich also fails to disclose subjecting the chocolate composition to shear of greater than 100 1/s before co-depositing it in the molds.

6. However, Franke discloses a method of processing chocolate for use in confectionary products which includes subjecting a liquid chocolate composition to a shear of greater than 100 1/s (translation, p.2, para. 8, discloses a chocolate fluid conching process using a shear gradient of 100-800 1/s).

7. It would have been obvious to one having ordinary skill in the art at the time of the invention to combine the method of making a filled confectionary article as disclosed by Aldrich, with the use of the chocolate processing steps disclosed by Franke to allow the use of a chocolate core, because subjecting the chocolate to shear allows the production of chocolate with flow properties desired for use in confections (translation of Franke, p.2, para. 8).

8. **Regarding claims 2 and 3**, the shear disclosed in Franke (translation, p.2, para. 8) overlaps these ranges.

9. **Regarding claim 4**, Aldrich discloses that the candy composition is a hard candy composition (column 3, lines 4-10), and that the first temperature is 143° C (column 4, line 65).

10. **Regarding claim 5**, Aldrich discloses that the second temperature is 38° C (column 4, line 65-66). In the context of the specification and claims of the pending application, this temperature is within the range specified by the temperature of 'about

40° C'. *Ortho-McNeil Pharm., Inc. v. Caraco Pharm. Labs., Ltd.*, 476 F.3d 1321, 1326, 81

USPQ2d 1427, 1432 (Fed. Cir. 2007)

11. **Regarding claim 6**, Aldrich further discloses using milk based products like chocolate, therefore disclosing using milk chocolate, as a core ingredient (column 3, lines 30-35).

12. **Regarding claim 7**, Aldrich in view of Franke does not disclose adding dark chocolate to milk chocolate. However, the term "up to" includes zero as a lower limit, *In re Mochel*, 470 F.2d 638, 176 USPQ 194 (CCPA 1974);

13. **Regarding claim 8**, Franke further discloses a stage wherein liquid cocoa butter(fat) is added in an amount to comprise 4-15% of the chocolate mass (Derwent abstract, para. 2). It would have been obvious to one having ordinary skill in the art at the time of the invention to modify the method of Aldrich with the addition of fat as disclosed by Franke, because adding fat to the chocolate mixture transforms the chocolate from a pasty mixture to one that is pumpable (Franke translation, p. 3, para. 12).

14. **Regarding claim 9**, Aldrich further discloses depositing the core composition through a nozzle (column 2, lines 63-68). This will generate a shear force on the composition before it is deposited. It would have been obvious to one having ordinary skill in the art at the time of the invention to adjust the shear generated by the nozzle in

order to produce chocolate with the flow properties desired (translation of Franke, p.2, para. 8), for the intended purpose, since it has been held that discovering the optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980)

15. **Regarding claim 10**, the method of Franke applies high shear to chocolates to provide them with refined rheological and sensory properties before being used in confectionary applications (translation p. 1, para. 2). Therefore, in practicing the method of claim 1 as disclosed by Aldrich and Franke, it is obvious that the chocolate composition is subjected to shear before being co-deposited on the confectionary article, because the shearing step of Franke occurs in the production of the coating chocolate.

16. **Claims 11-14** are rejected under 35 U.S.C. 103(a) as being unpatentable over Aldrich (US #4,517,205, hereafter Aldrich) in view of Franke (DE 19503635, English translation, and Derwent Abstract, hereafter Franke) as applied to claim 9 above, in further view of Cully (WO 96/39045, hereafter Cully).

17. **Regarding claim 11**, Aldrich in view of Franke discloses the method of claim 9, but fails to disclose subjecting the chocolate composition to a pre-shear prior to step (iii).

18. However, Cully discloses a method for processing chocolate which includes subjecting the chocolate to high shear prior to molding it (p. 2, lines 1-25, p.6, lines 5-10).

19. It would have been obvious to one having ordinary skill in the art at the time of the invention to combine the method of Aldrich in view of Franke, with the application of pre-shear as disclosed by Cully, because subjecting the chocolate to pre-shear reduces the viscosity of the chocolate, resulting in improved smoothness (Cully, p. 1, line 3-8).

20. **Regarding claims 12-14**, the shear is disclosed to overlap this range between 3000-5000 1/s (Cully, p. 6, lines 5-10). This pre-shear is greater than the high shear of 100-800 1/s disclosed by Aldrich in view of Franke.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ANDREW KRAUSE whose telephone number is (571)270-7094. The examiner can normally be reached on 7:30-5.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Callie Shosho can be reached on (571)272-1123. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/ANDREW KRAUSE/
Examiner, Art Unit 1794

/Callie E. Shosho/
Supervisory Patent Examiner, Art Unit 1794